public franchise have rendered a bridge necessary, the law, without any statutory requisition, imposes upon the grantee the duty, not only of erecting but maintaining the bridge. There is nothing in *Meadville* vs. *The Erie Canal Company*, 6 Harris 66, which is in conflict with these views. In that case, the original obligation to build the bridge was never upon the Commonwealth or upon the Company, and of course there was no liability on them to repair. There was error, then, in instructing the jury that the defendants are not liable for the money expended in repairing the footway.

Judgment reversed, and a *venire de novo* awarded.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.[1]

Schedule and Affidavit of Loss, not admissible as evidence in Action on Policy of Insurance—Waiver of preliminary Proofs, sufficiency of, a question of Law.—Preliminary proofs, though conditions precedent to the right of the insured to recover, may yet be waived, and hence are only important, when made so by the conduct of the insurers, for whose security and information they are required: *The Commonwealth Insurance Company* vs. *Sennett et al.*

Though the insurers may not object to the regularity of the preliminary proofs, yet the insured cannot prove his loss or the particulars of it by his own statement; he cannot make evidence for himself: *Id.*

Where the Court permitted the schedule, statements, and affidavits of the plaintiffs relating to their loss, to be read, not only to prove compliance with the conditions of the policy as to preliminary proof, but to go to the jury as *primâ facie* evidence of the goods lost, as to quantity and quality, but not as to value, it was error; for, there being nothing in the policy, making these papers evidence *per se*, they were not evidence of the goods lost, and should not have been read to or sent out with the jury: *Id.*

It is not necessary to prevent such use of the schedule and statements, that issue be taken or notice given before the trial, that their correctness would be called in question: *Id.*

[1] From Robert E. Wright, Esq., State Reporter, to be reported in the 5th volume of his Reports.

The preliminary proofs and their sufficiency are for the Court; if not sufficient the cause is at an end, unless they have been expressly or impliedly waived by the defendants: *Id.*

The rule is that if the preliminary proofs are waived or are sufficient, such waiver, or sufficiency, in effect strikes the condition requiring them out of the contract: *Id.*

Municipal Liens in Allegheny County—Divested by Judicial Sale of Property bound by them.—The Act of 3d February, 1824, enacting that municipal assessments in the city and county of Philadelphia should have priority over all other liens, &c., was extended to Allegheny county by Act of 5th April, 1844, and is the general law governing municipal liens in the latter county: *Allegheny City's Appeal—Tassey's Estate.*

Under this general law these liens are divested by a judicial sale of the property on which they are assessed: *Id.*

The special Acts of 5th April, 1849, P. L. 341, 8th April, 1851, P. L. 371, and 30th May, 1852, P. L. 204, do not change the law in this respect. The assessments authorized by those acts are discharged by a judicial sale of the property, so far as the money realized from the sale will pay the same: *Id.*

The phrase—"*shall be and remain a lien until paid and satisfied,*" discussed: *Id.*

Prior Executions, when and for what Cause postponed to subsequent Writs of Fieri Facias.—Where the goods of a merchant levied on under an execution, were not removed, nor the store closed, but was put in the hands of a clerk at the instance of plaintiffs' attorney, with privilege to sell as usual and account for the proceeds to the sheriff, and the clerk, with defendant, did sell goods up to the sheriff's sale, keeping no account of goods sold but only of the amount of money alleged to have been taken on sales, the execution will be postponed to one subsequently issued, though the levy in the first execution was not for security only and there was no unnecessary delay in executing it: *Parys & Co.'s Appeal.*

It is in contravention of the law to permit the possession and control of the property of a defendant in an execution to remain after levy as before, or to sell at private sale, it being not only fraud in fact but fraud in law; and if done in pursuance of arrangements made by the execution-creditor, he will be postponed to a junior execution: *Id.*

Partnership Debts.—Firm not liable for Money borrowed by individual Partner unless assumed.—If one person, for the purpose of entering into

partnership with another, borrow money, giving his individual note therefor, and it is used by the copartner in buying goods for the firm, the debt does not thereby become that of the firm unless expressly assumed: *Donnally* vs. *Ryan.*

Rescission in Equity of Contracts for false or fraudulent Representations.—An executory contract in which there has been a total failure of consideration will not be enforced either at law or in equity: but when the contract is executed, a court of equity will not interpose to rescind it except for fraud or palpable mistake: *Rockafellow* vs. *Baker.*

But where the buyer of an article, which he finds in market, has a full opportunity to examine it, and the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to buyer and seller, there being no warranty and no concealment by the seller of facts which he was bound to communicate, a mere false assertion of value is not a fraud or mistake in the legal sense of those terms: *Id.*

Presentment for Payment and Refusal, what are sufficient.—Within what time Notice of Non-payment must be given.—Defence to Action against Banker for negligence in demanding Payment of Note.—Notice to Indorser, when sufficient.—It is a sufficient presentment, demand, and refusal of payment of a note, or a legal equivalent thereto, that it was in the banking house where it was made payable on the day it fell due, and that there were no funds of the maker there, nor other provision for payment: *Hallowell & Co.* vs. *Curry et al.*

Where a note fell due on Saturday, and the residence of the holders and indorser, and the place of payment, were all in the same city, written or verbal notice of non-payment might have been given to the indorser personally; if written, it might have been left at his dwelling or place of business, either on that day or the following Monday: *Id.*

In an action by the owners of a note against a banking firm at whose office the note was made payable, for neglect in not demanding payment from the maker, and in not giving notice of the non-payment thereof to the indorser, by reason whereof he was discharged and the plaintiffs lost their debt, it is a sufficient defence to show that the maker had no funds in the banking office when it fell due, and that notice of dishonor was actually received in due time by the indorser: *Id.*

Where a notary received the note for protest from a clerk of the banking office where it was payable, between ten and eleven o'clock on the night

of the day it fell due, and he placed the notice of protest then made under the door of the indorser's residence, before twelve o'clock, at the request of his daughter, who took it up and placed it on her father's desk, so that he got the notice, it was sufficient, as the issue was upon the neglect of the defendants in not giving notice to the indorser of the non-payment of the note: *Id.*

SUPREME COURT OF NEW YORK.[1]

Municipal Corporations—Duty and Liability in respect to Sewers.—Although no action will lie against a municipal corporation for a refusal or omission of the Common Council to construct a sewer, yet, the corporation having made any of the improvements, or undertaken any of the public works, authorized by the charter, the duty is imperative to construct them in a proper manner, and keep them in proper repair: *Barton* v. *The City of Syracuse.* .

The act of construction, and the duty of keeping in repair after the same are complete, are ministerial in their nature; and for any neglect or omission of duty an action lies, at the suit of any party specially injured: *Id.*

Where the charter of a city, in the section conferring authority to make and repair streets, sewers, &c., in terms declares it to be the "duty of the mayor and common council" to do the acts mentioned, when they shall deem them proper, and they have adjudged a sewer to be proper and necessary, and have, at the expense of the property benefited, caused it to be built as a "local improvement," and paid for by a "local assessment," in pursuance of their charter, the duty of keeping it in repair is one of public concern, relating to the public welfare, and is to be regarded as imperative and peremptory. The corporation cannot negligently omit, or arbitrarily refuse, to exercise the power vested in it, to keep the same in repair: *Id.*

A property-owner, in connecting his drain with a public sewer, is not bound to guard against the negligence of the city corporation, and its want of care in preserving the sewer in repair. As he cannot foresee the negligence of the corporation, he is not called upon to guard against it. He is at liberty to assume that the sewer will be kept in repair: *Id.*

The negligence of the city corporation, in such a case, does not depend upon notice to them that the sewer is out of repair: *Id.*

If an obstruction in a sewer is the necessary and ordinary result of the

[1] From the Hon. O. L. Barbour, Reporter, to appear in the 37th volume of his Reports.

flow of water and filth into the sewer and an omission to guard against or remove it, this is in itself negligent. It is a neglect of duty not to ascertain that the sewer has become obstructed; and if, in consequence of such obstruction, water is set back, through the under-drain of an individual, into his cellar, the city is liable to him for damages: *Id.*

Highways; Encroachments upon, or Obstructions in; Right of Removal.—A mere encroachment on a public highway, by a fence, will not authorize the removal of the fence by an individual, unless it hinders, impedes, or obstructs the use of the road by the public: *Harrower et al.* v. *Ritson et al.*

An encroachment of a fence upon the highway is not a public nuisance, so as to authorize an individual to abate it, unless it interferes with the use of the road by the public: *Id.*

His justification will be limited by the necessity of the case; and if the use of the road is not interfered with by the fence, he will be a trespasser, in removing it: *Id.*

If there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury; and he can only interfere with it so far as is necessary to exercise his right of passing along the highway, doing no unnecessary damage: *Id.*

If one can, with reasonable care, notwithstanding the act complained of, enjoy the right or franchise belonging to him, he is not at liberty to destroy or interfere with the property of the wrongdoer: *Id.*

Landlord and Tenant.—Upon a letting of realty, lands, or tenements, there is no implied warranty that they are fit for the use for which the lessee requires them: *McGlashan* v. *Tallmadge.*

The maxim of *caveat emptor* applies to the contract of hiring of real property, as it does to the transfer of all property, real, personal, or mixed, with one or two recognised exceptions: *Id.*

In the absence of any fraudulent representations or concealment by the lessor, as to the state and condition of the premises let, and their fitness for the purpose for which they are hired, it is no defence to an action for the rent, that the premises were and continued to be unhealthy, noisome, and offensive, and unsuitable for a dwelling: *Id.*

Accord and Satisfaction—Joint Wrongdoers.—It is well settled that an accord and satisfaction by one of several obligors or wrongdoers is a satisfaction as to all; and a partial satisfaction by one of several wrongdoers is a satisfaction, *pro tanto*, as to all: *Merchants' Bank* v. *Curtis.*

In an action against the defendant for fraud in the negotiation of a loan from the plaintiff to H. upon his bond and mortgage, and for fraudulent representations and concealments relative to the mortgaged premises, it appeared that the negotiation of the loan was conducted by C., an attorney employed by the defendant; that on the discovery of the fraud, C., being charged therewith, executed, together with one T., a bond to the plaintiff, conditioned for the payment of the mortgage-debt; that C. subsequently confessed judgment in favor of the plaintiff for the amount then unpaid upon the mortgage-debt, and paid a portion of such judgment. *Held,* That, if there was *any* evidence to connect C. with the fraud and to show a guilty complicity on his part, it should have been submitted to the jury, with instructions that, if they found the defendant and C. were engaged in practising a fraud upon the plaintiff, then the sum paid by C. on his bond and the judgment recovered thereon should be allowed to the defendant in diminution of the damages, to that amount: *Id.*

And that the jury should have been further instructed that, if they found the defendant and C. together practised the fraud upon the plaintiff, and that upon C.'s being charged with it, he and T. executed their bond to the plaintiff in settlement and satisfaction of the cause of action then existing, the plaintiff was not entitled to recover: *Id.*

Will; subscribing Witness a Marksman.—It is not an insuperable objection to the valid execution of a will that one of the subscribing witnesses makes his *mark*, instead of writing his name. It is still a signing of his name, or subscription, within the meaning of the statute in regard to the execution of wills: *Morris et al.* vs. *Kniffin.*

Agreement to compound a Felony.—An agreement between B. and G. H. recited that certain promissory notes were to be executed by G. H. and P. H. to B. and placed in the hands of T., to be held by him until certain criminal prosecutions against G. H. then pending should be "discontinued and ended," and then the notes were to be delivered by T. to B. A further condition on which the notes were to be delivered to B. was that he should not arrest G. H., or cause him to be arrested, on any process whatever, but should cease all proceedings against him. Notes were executed in pursuance of this agreement, and put into the hands of T. In an action thereon by a subsequent holder, *Held*, That in effect both agreements were similar, and that the object and intent of both were to obstruct the course of justice, for a pecuniary consideration: *Porter* vs. *Havens et al.*

That they implied that B. should drop the criminal prosecutions, so far as he was concerned; that he would not appear against G. H.; and that he would, if possible, cause the criminal proceedings to be brought to a close. And that it was therefore a contract forbidden by law, and immoral and corrupt upon its face: *Id.*

And that the facts being undisputed and uncontradicted, there was no error in the judge directing a verdict for the defendant, and refusing to submit the evidence to the jury to determine the question of fact, whether the notes were given to settle or compound a criminal offence, or for any unlawful consideration: *Id.*

NEW YORK COURT OF APPEALS.[1]

Vendor and Vendee of Land—Strict Performance of Agreement.—The vendor in a contract for the sale of land being in default, and the time extended for his convenience, the vendee may insist upon strict performance at the very hour appointed: *Friess* vs. *Rider.*

The vendor again making default, but tendering performance after the lapse of three hours, the vendee is not required to assign any reason for his refusal to accept it, and it is, therefore, immaterial that he assigns a reason which is not well founded in fact: *Id.*

So held in an action by the vendor for stipulated damages, where the vendor, on the day for giving his deed, the vendee being then ready with his money, requested a postponement to a fixed hour the next day. At the time appointed the vendee attended, and, after waiting three hours, departed. At a subsequent hour of the same day, the vendor tendered a deed, and the vendee stated, as reason for declining, not the lapse of time, but waste of the premises, which was not supported by the facts: *Id.*

The case of *Gould* vs. *Banks* (8 Wend. 562) considered and limited, *per* ALLEN, J.: *Id.*

Receipt.—A writing in this form, "F. bought of W. one horse, $150. Received payment. W.," given upon the purchase of and payment for the horse, is a mere receipt, and not a contract or bill of sale, so as to exclude parol evidence of a warranty of soundness of the horse by the vendor: *Filkins* vs. *Whyland.*

Defective Mortgage.—An instrument, in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by its delivery to one who advances money upon the agreement that he shall hold the paper as security for his loan: *Chauncey* vs. *Arnold.*

[1] From E. P. Smith, Esq., Reporter; to appear in the 10th volume of his Reports.

Whether it could be made effectual by parol authority from the mortgagor to insert the lender's name as mortgagee: *Quære: Id.*

Sale of personal Property—Insolvency of Vendee—Rescission.—The vendee of goods which had come to his possession, ascertaining his insolvency, deposited them in warehouse subject to the order of the vendor, and notified him thereof by letter: before the vendor had signified his assent, the goods were attached by another creditor. *Held*, that the title of the vendor prevailed: *Sturtevant* vs. *Orser et al.*

The delivery to the warehouseman was a rescission of the contract of sale by the vendee, and the subsequent assent of the vendor relates to the time of such delivery: *Per* SMITH, J.: *Id.*

An actual assent to the rescission by the vendor's agent is to be assumed in support of the judgment, upon a statement of facts in harmony with such actual assent, and the absence of any facts tending to repel such presumption: *Per* DENIO, J.: *Id.*

Mutual Insurance Company—Note given to as Subscription to Capital.—A note given to a mutual fire insurance company, organized under the general law, as one of the notes required by the statute (chap. 308 of 1849) to make up its capital, is, in legal effect, payable on demand, *i. e.*, *at its date*, though by its terms payment was to be made at such times and in such portions as the directors might require: *Howland* vs. *Edmonds et al.*

No actual demand is necessary in respect to such a note. The statute under which it is given fastens on it the character of a note payable absolutely, or at the mere will of the holder: *Id.*

The statute of limitations begins to run against such a note at the time it is given, and is a good defence at the expiration of six years from that time: *Id.*

Mortgagee—Remedy.—A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance: *Burr* vs. *Beers.*

He may pursue this remedy without foreclosing the mortgage and without joining the mortgagor as defendant: *Id.*

Railroad Company—Exemption from Liability to gratuitous Passenger.—A railroad corporation cannot, by contract, exempt itself from liability to a passenger for damage resulting from its own wilful misconduct or

recklessness which is equivalent thereto: *Perkins* vs. *New York Central Railroad Company.*

But in respect to a gratuitous passenger it may contract for exemption from liability for any degree of negligence in its servants, other than the board of directors or managers who represent the corporation itself, for all general purposes: *Id.*

Whether the corporation is liable to a free passenger, so contracting, for negligence in the construction of the road, as upon an implied guaranty of its security, when the misconduct from which the injury resulted was that of a trackmaster who, knowingly, used rotten material in building a bridge, there being no evidence that it was known to the superior managing officers. *Quœre: Id.*

Railroad—Liability for injury to free Passengers—Who are not free Passengers.—It seems that the owner of cattle, transported for hire on a railroad, and who goes along in charge of them, under a contract that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause," is not to be regarded as a gratuitous passenger. *Per* WRIGHT, DENIO, and DAVIES, Js.: *Smith* vs. *New York Central Railroad Company.*

Whether, as to one who, in the manner stated, gives some consideration for being carried, a contract is valid which aims to exempt the carrier from liability for damages resulting from the negligence of his servants. *Quœre: Id.*

The owner of cattle travelling in charge of them, under such a contract, and paying no independent consideration for the conveyance of himself, was injured by the gross negligence of an agent of the carrier in using an unfit and dangerous car. The carrier was held liable by a divided court, four of the judges going on the ground that the contract for exemption from liability was void, as against public policy; and the fifth, that the negligence, as it respected the machinery of transportation, is imputable to the carrier himself: *Id.*

NOTICES OF NEW BOOKS.

DIGEST OF AMERICAN CASES RELATING TO PATENTS FOR INVENTIONS, COPYRIGHTS, AND TRADE-MARKS, from 1789 to 1862. By STEPHEN D. LAW, Counsellor at Law, Author of "Law's United States Courts," &c. New York: Published by the Author, 52 John Street. 1862.

STATUTE LAWS OF THE UNITED STATES RELATING TO COPYRIGHTS AND PATENTS FOR